

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA 08-673

SHELBY BARNETT AND LINDA
BARNETT

APPELLANTS

V.

KEITH GOMANCE AND WANDA
STAFFORD

APPELLEES

Opinion Delivered February 18, 2009

APPEAL FROM THE GARLAND
COUNTY CIRCUIT COURT,
[NO. CV 2006-1286 I]

HONORABLE JOHN HOMER
WRIGHT, JUDGE

DISMISSED

COURTNEY HUDSON HENRY, Judge

In this dispute concerning a boundary line, appellants Linda Shelby and Shelby Barnett own property in Garland County that adjoins land owned by appellee Keith Gomance and another parcel owned by appellee Wanda Stafford. Appellants purport to appeal the trial court's decision in favor of Stafford on her claim of trespass. For reversal, appellants contend that the trial court erred in finding that they had not proven the elements of either adverse possession or a boundary by acquiescence. We must dismiss this appeal because the trial court's decision is not a final order.

This case began in August 2005 when Gomance filed suit against appellants for the establishment of an easement by necessity. During the course of the litigation, Gomance brought a claim against Carolyn and Melvin Rigsby to enjoin the Rigsbys from blocking an

alleged public road. On Gomance's motion, the trial court dismissed his claims against appellants and the Rigsbys in December 2007.

In the meantime, on February 13, 2006, appellants filed a counterclaim against Gomance and Stafford,¹ asserting that they had committed trespass by destroying a fence allegedly situated on appellants' property. On February 21, 2006, Stafford filed a counterclaim against appellants for trespass, alleging that appellants had built a fence on her land. Stafford sought damages for the cost of removing the fence, damages for the trespass, and punitive damages for willful trespass.

Appellants took a nonsuit of their trespass claim against Gomance and Stafford,² and the case proceeded to trial solely on Stafford's claim of trespass against appellants. The focus of the lawsuit centered on a wire fence that has existed for many years. This fence does not lie on the true boundary line separating Stafford's and appellants' properties, but as a defense to Stafford's claim of trespass, appellants asserted that they had acquired title to the fence by adverse possession. Later, in a post-trial brief, appellants also argued that the fence had become the boundary between the properties by acquiescence.

In a letter opinion, the trial court issued a ruling in favor of Stafford, and the trial court entered an order memorializing its decision on February 19, 2008, setting the boundary in accordance with a 1997 survey.³ Appellants subsequently filed two post-trial motions

¹ Gomance is Stafford's son, and he resides on Stafford's property.

² The trial court entered an order dismissing appellants' counterclaim against Gomance and Stafford on February 14, 2008.

³ Although the trial court referenced the 1997 survey, the court attached to the order a 2005 survey.

challenging the trial court's decision, and on March 5, 2008, the trial court entered an order adhering to its previous ruling. Appellants filed a notice of appeal on March 18, 2008.

Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure—Civil (2008) provides that an appeal may be taken only from a final judgment or decree entered by the trial court. Whether an order is final and appealable is a matter going to the jurisdiction of the appellate court, and it is an issue that the appellate court has a duty to raise on its own motion. *Dobbs v. Dobbs*, 99 Ark. App. 156, 258 S.W.3d 414 (2007). An order is not final when it adjudicates fewer than all of the claims or the rights and liabilities of fewer than all of the parties. *Hanners v. Giant Oil Co. of Ark., Inc.*, 369 Ark. 226, 253 S.W.3d 424 (2007).

Here, the trial court's orders addressed the underlying issue of trespass, but the trial court did not dispose of Stafford's request for compensatory and punitive damages. The supreme court has held on numerous occasions that a judgment is not final and appealable if the issue of damages remains to be decided. *U.S. Bank v. Milburn*, 352 Ark. 144, 100 S.W.3d 674 (2003). See, e.g., *Mueller v. Killam*, 295 Ark. 270, 748 S.W.2d 141 (1998) (holding that a decree finding trespass was not final where the trial court did not award damages). Rule 54(b) of the Arkansas Rules of Civil Procedure (2008) allows a trial court to direct the entry of final judgment as to fewer than all of the claims by executing a certification of final judgment. However, the trial court made no 54(b) certification in this case. Accordingly, we must dismiss the appeal for the lack of a final, appealable order because Stafford's damage claims are outstanding.

Dismissed without prejudice.

GLADWIN and BAKER, JJ., agree.